

**IN THE MĀORI LAND COURT OF NEW ZEALAND  
TĀKITIMU DISTRICT**

**A20140012769**

UNDER Sections 231, 237 and 238, Te Ture Whenua  
Māori Act 1993

IN THE MATTER OF Poukawa 9G Trust

BETWEEN MEAFOU CLARKE  
Applicant

AND WAHIAO JIM GRAY  
First Respondent

AND FAYE WALKER, MARIA KAHUKIWA,  
MARION RUKUPO, MOSS TAWHAI and  
THOMAS ELLIS CLARKE as former trustees  
of POUKAWA 9G TRUST  
Second Respondents

**A20140012775**

UNDER Sections 237, 244 and 308, Te Ture Whenua  
Māori Act 1993

IN THE MATTER OF Poukawa 9G Trust

BETWEEN WAHIAO RAYMOND JAMES GRAY  
Applicant

Hearings: 21 Tākitimu MB 236 – 253 dated 30 January 2013  
36 Tākitimu MB 125-155 dated 6 November 2014  
46 Tākitimu MB 258 – 270 dated 3 December 2015

Appearances: C Bennett for Meafou Clarke  
C Bidois for Faye Walker  
P Harman for Thomas Clarke  
L Watson for Jim Gray

Judgment: 29 April 2016

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**RESERVED JUDGMENT OF JUDGE L R HARVEY**

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## Introduction

[1] Meafou Clarke seeks orders to compel the responsible trustee of Poukawa 9G Trust to recover losses flowing from the conduct of former trustees in breaches of trust. The present application has its foundation in earlier proceedings involving the enforcement of obligations of trust and related litigation.

[2] While the respondent former trustees initially resisted such claims, all parties have now come to an agreement to settle all outstanding matters at issue, following a process of negotiation and consultation with the owners. This includes the unique interests of Hohepa Te Hoata who is a beneficiary of only one of the two trusts involved in these proceedings. The parties therefore seek the approval of the Court to the proposed settlement.

[3] Overall, the principal issue for determination is whether the Court should give effect to the resolutions agreed at the owners' hui held on 30 September 2015 and the orders now sought by consent.

[4] The specific issues are:

- (a) Should the Reservation Trust be given ownership of the Mangakoura Hall?
- (b) Is Hohepa Te Hoata entitled to a compensation payment?
- (c) Is a charging order appropriate?
- (d) What repayment is required of the former trustees?
- (e) Should the current responsible trustee receive an indemnity?
- (f) Is Mr Te Hoata entitled to Special Aid?

## Background

[5] The Poukawa 9G Trust is an ahu whenua trust originally constituted on 22 January 1987 as the Maera Family Trust, in relation to Poukawa 9G, Patangata 3D1 and Patangata 3D3 blocks.<sup>1</sup> The original trustees were Faye Walker, Wakiterangi Koko, Maria Kahukiwa, Ann Clarke and Hinetemoa Tawhai.

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<sup>1</sup> 122 Napier MB 320-322 (122 NA 320-322)

[6] The terms of trust were subsequently varied on 12 February 1990 and the trust became the Poukawa 9G Trust.<sup>2</sup>

[7] The current responsible trustee is Wahiao Raymond James Gray and the current advisory trustees are Raeleen Wilson, Elizabeth Clarke and Marilyn Bartlett.<sup>3</sup>

*Earlier proceedings*

[8] Prior to these proceedings, as foreshadowed, Judge Coxhead dealt with earlier applications filed in 2008 for a review of this trust, enforcement of obligations of trust and for the removal of trustees. As part of those proceedings, he commissioned an independent report by Peter Bloor to address the financial affairs of the trust, the management of the trust assets, the lease, licence and occupation arrangements along with the operation of the trust in general.

[9] Following the report, Judge Coxhead issued a decision dated 14 February 2011 finding that the trustees had failed to perform their duties as trustees satisfactorily and ordering their removal on the appointment of replacement trustees.<sup>4</sup>

[10] In his decision the Judge noted that the appointment of an independent trustee was appropriate and directed the Registrar to facilitate a meeting of owners on an urgent basis to consider the election of replacement trustees. The matter was to return to Court for the appointments following such election. The Court signalled that the independent trustee would be appointed on an interim basis and would be required to undertake an investigation as to what losses, if any, had been caused by the actions of the former trustees.

[11] Following the meeting of owners, Jim Gray was appointed as the independent responsible trustee on an interim basis, along with three advisory trustees, and was directed to undertake an investigation.<sup>5</sup> The Court noted that the findings of such investigation may lead to further action in terms of seeking recovery for any losses caused by the actions of the former trustees.

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<sup>2</sup> 129 Napier MB 38 (129 NA 38)

<sup>3</sup> 9 Tākitimu MB 244-257 (9 TKT 244-257)

<sup>4</sup> *Clark v Walker – Poukawa 9G Block* (2010) 6 Tākitimu MB 285 (6 TKT 285)

<sup>5</sup> 9 Tākitimu MB 244-257 (9 TKT 244-257)

[12] Directions were issued for general meetings to be held by Mr Gray at the conclusion of the first and second years of his appointment, to report on the administration, management, and financial status of the trust and whether any variation of the trust order was required. At the conclusion of the third year, Mr Gray was to call an annual general meeting to consider the future administration of the block and whether owner trustees should be appointed.

[13] The investigation report of Mr Gray dated 28 August 2011 was filed on 1 October 2011. Mr Gray advised that as the report was concluded he was moving into the “second phase” as responsible trustee.

*The 2011 Report of Mr Gray*

[14] The report of Mr Gray found that losses amounting to \$27,897.72 had been incurred because of the actions of the former trustees. He argued that each trustee should be required to make good the sum of \$6,974.45, given they are jointly and severally liable.<sup>6</sup>

[15] The report also identified losses arising from trustee breaches in several areas, including the purchase and maintenance of the Mangakoura Hall, loans to trustees and various gratuitous payments. At the conclusion of his report, Mr Gray recommended that:

- (a) The misuse of the funds be reported to the Police and that all efforts be made to recover the funds;
- (b) The standard Waiariki wide powers trust order be implemented and a new trust order be prepared based on that template if necessary;
- (c) There be no changes in terms of beneficial owner consultations;
- (d) A meeting of all of the beneficial owners of the three blocks be called to consider aggregation of the blocks;
- (e) As the current lease arrangements are due to expire an attempt be made to increase the income and that the possibility of intensive cropping be explored;

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<sup>6</sup> This figure is taken from the executive summary of Mr Gray’s report, however the total amount owed is also recorded on p 23 of his report as \$27,899.72, while the calculations on that page appear to only amount to \$27,840.22

- (f) Trustee training be undertaken;
- (g) Where the trustees have not acted with honesty and integrity, that they be removed from other Māori authorities and not permitted to serve as trustees, and their involvement with other Māori trusts be investigated if necessary; and
- (h) In addition to reporting the misuse of funds to the Police, the trustees be named individually in the trust's accounts as debtors in the amount owing, for a period of five years or until the amount is repaid.

[16] Subsequent to the filing of Mr Gray's report, the applications were completed. No further applications were filed to recover the losses prior to the commencement of the current proceedings.

### **Procedural history**

[17] An application was filed on 23 May 2012 by Meafou Clarke, a former trustee, seeking orders for a review of trust, the enforcement of the obligations of trust and for directions, pursuant to ss 231 and 238 of Te Ture Whenua Māori Act 1993 ("the Act"). The applications were made on the basis of requiring the responsible trustee to pursue action against the former trustees, for their breaches of trust and maladministration and to restore the trust to its position prior to such breaches.

[18] On 6 June 2012, I asked the registrar to make enquiries as to whether the 2011 report of Mr Gray had been distributed to all affected parties for their consideration and response. I requested a response from Mr Gray on 31 July 2012 and subsequently directed that a copy of his report be sent to all parties from the original proceedings on 3 September 2012.

[19] On 23 October 2012 Mr Gray filed an application for directions,<sup>7</sup> followed by an application for aggregation of the trust's land on 22 January 2013,<sup>8</sup> and applications for a variation of trust and two further applications seeking directions on 30 January 2013.<sup>9</sup>

[20] All applications were set down for hearing together before me on 30 January 2013, where general discussions took place regarding the issues, representation of parties and the

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<sup>7</sup> Application A20120013592

<sup>8</sup> Application A20130001315

<sup>9</sup> Applications A20130001466, A20130001468, A20130001469

timetabling of the applications to a hearing.<sup>10</sup> There was also discussion of whether it was more appropriate for Judge Coxhead to preside over the applications, given his familiarity with the subject matter to date and the parties. At the conclusion of the hearing I directed that the applications be set down for hearing in March 2013, with a telephone conference to be held two weeks prior, to check the readiness of the parties. I indicated that I would enquire with Judge Coxhead as to his availability. If he was unavailable, I or another Judge would proceed to hear the applications.

[21] A telephone conference was then convened on 25 February 2013 before Judge Coxhead.<sup>11</sup> The standing of Meafou Clarke to bring the applications was raised as a preliminary issue and directions were made by Judge Coxhead for the filing of submissions prior to a substantive hearing. The hearing set for March 2013 was duly vacated.

[22] On 19 April 2013, Judge Coxhead issued his decision, finding that Mr Meafou Clarke did have standing to bring his applications for directions, a review of trust, and the enforcement of obligations.<sup>12</sup> He directed a further telephone conference for timetabling purposes, which was subsequently held on 3 May 2013.<sup>13</sup>

[23] Further directions were issued on 29 May 2014 for Mr Gray, the responsible trustee, to file annual accounts, along with a status report from all parties regarding the current applications before the Court. Then on 29 August 2014 Judge Coxhead directed that all applications be dealt with by me as the Tākitimu presiding Judge, which was agreed to by the parties.

[24] The proceedings were then heard on 6 November 2014.<sup>14</sup> At the conclusion of the hearing I dismissed one of the applications for directions, which did not require further action, and held a chambers conference with counsel, in an effort to identify any available solutions or to isolate the issues remaining, in preparation for a further hearing.<sup>15</sup>

[25] In December 2014 at my direction all the existing applications were administratively concluded and new application numbers allocated for the hearing files.<sup>16</sup>

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<sup>10</sup> 21 Tākitimu MB 236-253 (21 TKT 236-253)

<sup>11</sup> 21 Tākitimu MB 295-301 (21 TKT 295-301)

<sup>12</sup> *Clarke v Gray – Poukawa 9G and Others Trust* (2013) 23 Tākitimu MB 92 (23 TKT 92)

<sup>13</sup> 23 Tākitimu MB 132-135 (23 TKT 132-135)

<sup>14</sup> 36 Tākitimu MB 125-155 (36 TKT 125-155)

<sup>15</sup> Application A20120013592

<sup>16</sup> Applications A20140012769, A20140012775

[26] There matters lay until 17 August 2015 when I issued directions for accounts to be filed along with progress reports from all parties. These were filed together with minutes of a hui held on 30 September 2015. At the hui the parties had largely settled matters and an agreed approach was presented to the Court at the final hearing on 3 December 2015.<sup>17</sup> I was satisfied that a grant of the orders sought by consent should be made, but would consider the particular provisions under which such orders were to issue. I confirmed therefore that a written decision would issue in due course.

### **Applicant's submissions**

[27] Ms Bennett submitted that as a consequence of the closing of the earlier applications, the decision of the Court issued on 14 February 2011 remained unfulfilled. She argued that the findings made in that 2011 decision have not been appealed and can therefore be considered findings of fact and law. Ms Bennett submitted that it was the clear expectation of the applicant that once the report of Mr Gray had been completed, it would be referred to all affected parties for consideration and matters would be brought back before the Court.

[28] However, that did not occur, and when contacted, Mr Gray advised that he was unwilling to bring any application to recover funds without the express sanction of the Court, believing that the Court of its own motion would consider the report and issue orders as part of the original proceedings. Ms Bennett argued that it was those circumstances which necessitated the filing of these proceedings.

[29] Ms Bennett submitted that the applicant wished to finalise the matters and ensure that the trust is restored as closely as possible to its state prior to its maladministration by the former trustees. The applicant sought orders requiring the responsible trustee to recover the losses caused by the former trustees and take all practical steps in doing so.

### **Respondents' submissions**

[30] The responsible trustee, Jim Gray, and two former trustees, Faye Walker and Thomas Clarke, also participated as respondents in the proceedings, with all parties being represented by counsel. Several submissions were made by counsel throughout the lengthy proceedings, addressing the issues arising from the report of Mr Gray and the orders sought

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<sup>17</sup> 46 Tākitimu MB 258-270 (46 TKT 258-270)

by the applicant. However, as the proceedings developed the defended positions initially taken by the parties were eventually modified in favour of an agreed approach to the settlement of the issues.

### **An agreed approach to resolution**

[31] As foreshadowed, the positions of the parties evolved over the course of the proceedings, ultimately resulting in an agreed approach to settlement of the majority of the issues. The agreement was the result of a full discussion by the owners at a meeting held in September 2015. As counsel for the responsible trustee, Mr Watson, stated, the meeting was most notable for the way in which the former trustees, Faye Walker and Thomas Clarke, addressed their breaches of trusteeship and the response of the applicant and Robert Clarke in expressing a desire to reach a resolution of the issues.

[32] Mr Watson and counsel for Ms Walker, Mr Bidois, both made written submissions prior to the final Court hearing, broadly outlining the agreement reached between the parties. All counsel then had an opportunity to make further submissions at the hearing. The parties now seek approval for orders by consent.

### **The proposed terms of settlement**

[33] First, per s18(1)(a) of the Act determining the ownership of the building known as the Mangakoura Hall in favour of the trustees of the Tauhara Middle 4A1N1B Māori Reservation (“the Reservation Trust”), also known as the Te Rore Tuihana Whānau Trust.

[34] Second, per ss 237 and 238 that the responsible trustee pay the sum of \$11,558.12 to Hohepa Te Hoata in full satisfaction of his interest in the Mangakoura Hall.

[35] Third, per s 82(1)(c) for a charging order over the revenue derived from the Poukawa 9G Trust’s lands in favour of Mr Te Hoata, in the amount of \$11,558.12, and s 242 for payment of such funds to Mr Te Hoata when available.

[36] Fourth, per s 98 that the legal costs of Mr Hoata be met by the Special Aid Fund.

[37] Fifth, per s 238 that Faye Walker pay interest on the trust money loaned to her in the amount of \$106.17, which the responsible trustee will accept in full settlement of liability, and that Thomas Clarke pay the sum of \$300.00 to the trust in relation to money advanced

by the trust for tuition fees, such repayment to be by weekly instalment of \$10.00, which the responsible trustee will accept in full settlement of liability.

[38] Sixth, per s237 of the Act and s 73 or s 64 of the Trustee Act 1956, relieving the responsible trustee from liability in not pursuing losses with respect to:

- (a) The use of trust money to purchase and maintain the building known as the Mangakoura Hall;
- (b) The failure to disclose all known lease offers for the Patangata land blocks;
- (c) The overpayment of dividends;
- (d) The overpayment of trustee mileage allowance; and
- (e) The payment of koha and Christmas presents for kaumātua.

[39] It was also noted by the parties that the aggregation of the blocks, the adoption of a new trust order, and the election of trustees were matters which were supported in principle at the owners' meeting. It was decided, however, that those matters are to be the subject of a formal postal vote, after which they will return to the Court via fresh applications.

### **Discussion**

*Should the Reservation Trust be given ownership of the Mangakoura Hall?*

[40] The purchase and maintenance of the Mangakoura Hall was one of the central issues in these proceedings involving the most significant amount of trust fund losses. The former trustees purchased the hall from Lochinvar Station, using dividend payments due to the beneficial owners of Poukawa 9G Trust and relocated it to the Tauhara Middle 4A1N1B Māori Reservation, a block which does not form part of the trust's lands. The total amount of funds expended on the purchase, maintenance and improvement of the hall was identified by Mr Gray as \$17,830.42.

[41] Mr Bidois submitted that the ownership of the Mangakoura Hall has always been unclear. On the one hand, the hall is likely a fixture on the Tauhara Middle 4A1N1B Māori Reservation block and there is therefore a presumption that the hall is owned by the Reservation Trust. On the other hand, the Poukawa 9G Trust is entitled to claim equitable ownership of the Hall, given that it paid for its purchase and ongoing maintenance costs. Mr

Bidois argued that an order determining ownership of the hall is desirable for the avoidance of future disputes.

[42] Section 18(1)(a) provides the Court with jurisdiction to determine ownership of a building on Māori freehold land. That section provides:

**18 General jurisdiction of court**

- (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
- (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[43] The Court's jurisdiction under s 18(1)(a) is declaratory in nature, allowing the Court to declare existing ownership rights at law or in equity, but preventing the Court from creating new ownership rights.<sup>18</sup> While it is trite law that a fixture belongs to all of the owners of the land in accordance with their respective interests, in relation to Māori freehold land, even where a building is a fixture, this Court has equitable jurisdiction per s 18(1)(a) to determine the ownership of a building as distinct from the ownership of the underlying land.<sup>19</sup>

[44] The 2011 report of Mr Gray identified that the hall is used as accommodation for members of former trustees' families. At other times the hall is said to be used by the beneficial owners of Poukawa 9G Trust for meetings, but given the significant physical distance between the location of the hall and the other Poukawa 9G Trust lands, such use is limited. Mr Gray found that the benefits of using the hall are not spread equally across all beneficial owners of Poukawa 9G Trust lands and such benefits appear to only accrue to certain individuals. He considered therefore that the expenditure of trust funds in maintaining the hall was not justified.

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<sup>18</sup> See *McCann - Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Tākitimu Appellate MB 2 (11 ACTK 2); *Paki - Matauri X Incorporation* (1996) 5 Taitokerau Appellate MB 16 (5 APWH 16); and *Ngā Uri a Maata Ngapo Charitable Trust v McLeod - Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223)

<sup>19</sup> See *Tohu - Te Horo 2B2B Residue* (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34); *Bidois - Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102); *Ngā Uri a Maata Ngapo Charitable Trust v McLeod - Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223); *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Anderson - Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206); and *Rata - Pakanae 2W1B* (2016) 125 Taitokerau MB 17 (125 TTK 17)

[45] The parties have now agreed that ownership of the Mangakoura Hall should be determined in favour of the trustees of the Reservation Trust. At first blush, the decision by the trustees to purchase a hall and then move it onto another trust's land appears unusual at best, as does an agreement by the beneficial owners to allow that other trust ownership. However, there is a very high commonality of ownership between the two, with only one owner outside that ownership. The reality is therefore, that whether the ownership of the hall is determined in favour of the Poukawa 9G Trust or the Reservation Trust, essentially the same people will have the benefit of such ownership.

[46] On a more practical level, it appears the hall is fixed to the Reservation Trust's land and even if it was not, there has been no suggestion that the hall should be relocated to the Poukawa 9G Trust's lands. The location of the hall therefore makes its use by the Poukawa 9G Trust impractical. In addition, determination of ownership in favour of the Reservation Trust would provide certainty to all parties as to which trust is responsible for the ongoing care and maintenance of the hall.

[47] For these reasons I am satisfied that an order determining the ownership of the Mangakoura Hall in favour of the Reservation Trust is appropriate.

*Is Hohepa Te Hoata entitled to a compensation payment?*

[48] Mr Te Hoata is the only owner in the Poukawa 9G Trust who is not also an owner or beneficiary of the Reservation Trust. A determination that the hall is owned by the Reservation Trust would mean that Mr Te Hoata's ownership in the hall would naturally be extinguished, and he would not receive any benefit from the use of Poukawa 9G Trust funds to purchase the hall. The parties agree that an award should accordingly be made to Mr Te Hoata in satisfaction of his beneficial interest in the hall.

[49] The Court has jurisdiction under s 18(1)(a) to grant equitable relief, such as compensation, to recognise a claim or interest of a non-owner in structures located on Māori freehold land.<sup>20</sup> The Court can also grant equitable remedies, including equitable compensation, under ss 237 and 238 of the Act, where there has been a breach of trust or breach of fiduciary duties.<sup>21</sup>

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<sup>20</sup> See *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 18I* (2003) 73 Tauranga MB 150 (73 T 150); *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2)

[50] In the present case funds of Poukawa 9G Trust were used to purchase and maintain the Mangakoura Hall in breach of trust. Mr Te Hoata, as a beneficial owner in that trust was entitled to the benefit of those funds and therefore has a corresponding equitable interest in the hall. The effect of determining the ownership in favour of the Reservation Trust is that Mr Te Hoata is entitled to equitable relief to recognise his interest in the hall and prevent a case of unjust enrichment to the Reservation Trust.

[51] Mr Te Hoata is an owner in all three blocks of the Poukawa 9G Trust's lands and such shares equate to a 33.8977 per cent total shareholding. The amount proposed as payment to Mr Te Hoata is \$11,558.12, which represents his share of the total value of the Mangakoura Hall, which has been calculated as \$34,097.00.

[52] In summary, I accept that the payment of compensation to Mr Te Hoata is appropriate in the circumstances and agree with the sum of \$11,558.12, representing Mr Te Hoata's percentage of shareholding in Poukawa 9G Trust's lands. I consider that this order is more appropriately made per s 18(1)(a) of the Act and to avoid doubt s 242, given the order is necessitated by the determination of the ownership of the hall and because the funds are held in trust.

*Is a charging order appropriate?*

[53] The parties also sought an order that any award in Mr Te Hoata's favour be secured by way of a charge over the future revenue of the Poukawa 9G Trust, per s 82 of the Act. Counsel submitted that consideration had been given to whether a redirection of future dividends would be more appropriate. However, as there would likely be tax consequences for those owners receiving a dividend and other costs of administering such payments, counsel submitted that it would be more efficient overall if owner dividends were suspended until such time as Mr Te Hoata had been paid in full. Counsel for the applicant additionally sought an order for payment under s 242 of the Act to run alongside any charging order to compel such payment when the trust is in funds, which was endorsed by the other counsel.

[54] I accept that a charging order over the future revenue of the Poukawa 9G Trust is appropriate, and I note that it is not uncommon for the payment of equitable compensation to

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<sup>21</sup> *Mikaere-Toto v Te Reti B and C Residue Trust* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249); *Adlam v Savage* [2015] Māori Appellate Court 59 (2015 APPEAL 59)

be secured in this way.<sup>22</sup> Section 242 of the Act also gives the Court power to grant an order for money held in trust to be paid to the person beneficially entitled. I consider that such an order can issue alongside the charging order as sought, directing the trust to pay Mr Te Hoata what he is entitled to when such funds become available.

*What repayment is required of the former trustees?*

[55] In the earlier proceedings the Court found that the former trustees Faye Walker and Thomas Clarke received trust funds in breach of their duty to act gratuitously and in breach of the no-conflict rule.<sup>23</sup> The report of Mr Gray subsequently found that there were resulting losses attributable to those breaches.

[56] In relation to Ms Walker, she received two interest-free loans. While the loans have been repaid in full by Ms Walker, the report of Mr Gray recommended that interest be paid. In relation to Mr Clarke, he received trust funds to pay tuition fees for a Māori language course at Te Wānanga o Aotearoa. Those funds have not been repaid and Mr Gray recommended that those tuition fees be reimbursed.

[57] Where a trust suffers loss occasioned by a breach of trust, trustees have an ongoing obligation to restore to the trust estate the assets that have been converted or used improperly in breach of trust.<sup>24</sup> Sections 237 and 238 of the Act empower the Court to enforce the obligations of trust in respect of a trustee at any time, including by way of equitable remedies such as restitution, equitable compensation or accounting for profit.<sup>25</sup>

[58] In the present case, both Ms Walker and Mr Clarke have acknowledged the debts they owe to the trust and agreed to repay the debts in line with the discussion at the owners meeting. Ms Walker agreed to pay the sum of \$106.17, being interest of five per cent on her loans, and Mr Clarke agreed to repay the full amount of his tuition fees, being \$300.00, to be paid by instalments of \$10.00 per week. Mr Gray as responsible trustee has indicated that he

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<sup>22</sup> See *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2)

<sup>23</sup> *Clark v Walker – Poukawa 9G Block* (2010) 6 Tākitimu MB 285 (6 TKT 285) at [50] – [56]

<sup>24</sup> See *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSW 211, at 216; *Re Mulligan* [1998] 1 NZLR 481 (HC), at 507; *Target Holdings Ltd v Redfems* [1996] AC 421 at 434; and *Bank of New Zealand v New Zealand Guardian trust Co Ltd* [1999] 1 NZLR 664 (CA)

<sup>25</sup> See *Mikaere-Toto v Te Reti B and C Residue Trust – Te Reti B and C Blocks* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249); *Adlam v Trustees of the Otonga Whānau Trust* [2015] Māori Appellate Court MB 59 (2015 APPEAL 59)

will accept the repayments in full satisfaction of the liability of Ms Walker and Mr Clarke. The orders are therefore sought by consent.

[59] I am satisfied that, by virtue of the owners meeting held in September 2015, the beneficial owners are aware of the extent of the losses occasioned by breaches of the former trustees, which were identified in the report of Mr Gray. The beneficial owners have agreed on the extent to which Ms Walker and Mr Clarke should restore the trust estate in satisfaction of their obligations as trustees. Accordingly, an order will issue for the enforcement of obligations of trust against Ms Walker and Mr Clarke in the amounts specified.

*Should the current responsible trustee receive an indemnity?*

[60] The parties submitted that, due to the agreement reached at the owners' meeting, the responsible trustee is effectively being asked to forego pursuing the former trustees for the full amount of the trust losses occasioned by the breach of their trustee duties. On that basis counsel sought an order pursuant to s 237 of the Act and either s 73 or s 64 of the Trustee Act 1956 to relieve Mr Gray from future liability in not pursuing the former trustees with respect to: the use of the trust money to purchase and maintain the Mangakoura Hall; the failure to disclose all known lease offers for the Patangata lands; the overpayments of owner dividends and trustee mileage allowances; and the payment of koha and Christmas presents to kaumatua.

[61] Section 237 of the Act allows the Court to exercise all the same powers and authorities as the High Court in respect of trusts generally, adding to the Court's armoury of powers in relation to trusts.<sup>26</sup> The Court is therefore able to invoke its powers under the Trustee Act 1956.

[62] Sections 64 and 73 of the Trustee Act 1956 provide:

**64 Power of court to authorise dealings with trust property**

- (1) Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially

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<sup>26</sup> See *Proprietors of Mangakino Township v The Māori Land Court*, CA65/99, 16 June 1999; *Clarke v Karaitiana* [2011] NZCA 154

interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income:

provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the court, in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

(2) *Repealed*

(3) The court may from time to time rescind or vary any order made under this section, or may make any new or further order:

provided that no such rescission or variation of any order shall affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the court to rescind or vary the order.

(4) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

...

### **73 Power to relieve trustee from personal liability**

If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the same

[63] At the hearing there was some discussion by counsel as to whether s 73 or s 64 of the Trustee Act 1956 was more appropriate for granting Mr Gray relief from liability. Mr Bidois contended that s 73 was commonly used when relieving trustees from liability for past events and actions, whereas in the present circumstances the relief is sought in relation to any future liability. He submitted therefore that s 64 of the Trustee Act 1956 was the more preferable provision, as it focuses on events yet to occur. Ms Bennett generally agreed, submitting that s 73 related to a retrospective order while s 64 related to forward seeking actions, although she noted that both provisions are to some extent applicable in this instance.

[64] It is well settled that in order for trustees to obtain the benefit of relief per s 73 of the Trustee Act 1956, they must show that they have acted both honestly and reasonably and that

they ought fairly to be excused for the breach and for any failure to obtain the directions of the Court.<sup>27</sup> The authors of *Garrow and Kelly: Law of Trusts and Trustees* discuss the extent of the Court's power under s 73 of the Trustee Act 1956 and note:<sup>28</sup>

The Court has power under s 73 to relieve trustees who *have acted* honestly and reasonably: this does not extend to excusing a trustee from liability for a contemplated breach of trust. In *Re Rosenthal (deceased)* Plowman J held that trustees could not be relieved under the English equivalent of s 73 in respect of a breach of trust that had not yet been committed. However, the Court does have other powers which enable it to approve a departure from the strict terms of the trust:

- (a) Section 64(1) – the Court may authorise particular transactions and dispositions.
- (b) Section 64A – approval of a variation of trust.
- (c) Exercise of the Court's inherent jurisdiction in an emergency.

[65] The authors also note that s 64 has a wide ambit, as it permits the Court to sanction not only transactions which would otherwise be unauthorised, but also transactions which are within the power of the trustee, where it may be inexpedient, difficult or impractical for the trustee to exercise that power.<sup>29</sup> This jurisdiction is subject to any contrary intention expressed in the trust instrument.<sup>30</sup> It is also said that the Courts have interpreted s 64 liberally and orders have been made approving a wide variety of transactions.<sup>31</sup> However, before making an order, the Court must be satisfied that the transaction in question is expedient for the trust as a whole and not merely in the interests of one beneficiary.<sup>32</sup>

[66] Mr Bidois argued that s 64 applied to the present case as under s 64(1) the Court can grant authority to trustees if it is of the opinion that a "...release... would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the court...". Mr Bidois submitted that Mr Gray as the current responsible trustee would be "releasing" the former trustees from liability, which would be impractical for him to do without the Court's authority, as by doing so he would expose himself to potential liability in the future.

[67] Counsel did not refer me to any relevant authority in terms of the application of s 64. However, I note in *Paki v Māori Land Court* the High Court considered s 64 and 64A of the

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<sup>27</sup> See *Tauhara Middle 4A2B2C – Opepe Farm Trust* (1996) 68 Taupo MB 27 (68 TPO 27); *Hall v Opepe Farm Trust* (2010) 19 Waiariki MB 258 (19 WAR 258);

<sup>28</sup> Greg Kelly and Chris Kelly *Garrow and Kelly: Law of Trusts and Trustees* (7<sup>th</sup> ed, LexisNexis, Wellington, 2013) at [28.18]

<sup>29</sup> *Ibid*, at [20.22]

<sup>30</sup> *Ibid*, at [20.29] – [20.30]

<sup>31</sup> *Ibid*, at [20.22] – [20.26]

<sup>32</sup> *Ibid*, at [20.27]. See also *Re Dawson* [1959] NZLR 1360

Trustee Act 1956 and its use by this Court.<sup>33</sup> The High Court confirmed that by virtue of s 237 of the Act, the jurisdiction conferred by s 64 of the Trustee Act 1956 is shared by the Māori Land Court in respect of trusts, and provides the Court with extensive powers. In that particular case the High Court found that this Court had jurisdiction under ss 64 and 64A to declare terms of trust in respect of a trust constituted over Māori land in order to provide that trust with effective management and administrative rules.

[68] The decision of *Eaton v LDC Finance Limited* is also helpful.<sup>34</sup> The High Court considered an application for orders enforcing a trust, essentially the formal appointment of trustees and approval of a settlement agreement reached between parties. The trustees had earlier succeeded in their claim against the defendants, however, that decision had been subject to an appeal. Prior to the appeal proceedings the trustees had negotiated a settlement and they sought an order pursuant to s 64 of the Trustee Act 1956 to authorise them to dispose of trust funds by settling the claims in accordance with the terms of the agreement.

[69] Some beneficiaries raised concerns with the agreement, particularly that it would prevent them from separately pursuing legal proceedings against the parties to the settlement if the Court approved it, but those concerns did not go as far as opposing settlement. The Court noted that the trustees had to make a decision whether to risk the benefits of the earlier judgment against the appeal proceedings succeeding, or secure a compromise in the form of settlement, relying on professional advice and an analysis of the risks. The Court considered that the decision by the trustees to settle was prudent and accepted their reasoning as to why it was in the best interests of all the beneficiaries and expedient in the management of the property vested in the trustees. Accordingly, the Court issued an order per s 64 of the Trustee Act 1956 conferring on the trustees the power to enter into the settlement agreement.

[70] The parties seek an order in relation to the future actions of Mr Gray. In terms of the requirements of s 64(1), I consider that what is sought by the parties amounts to an order granting authority to Mr Gray to implement a settlement of issues agreed to by those beneficial owners present at the owners' meeting. Such an order will naturally bind all owners to the agreement. As Mr Bidois submitted, it is a release of the former trustees from liability on agreed terms. I consider that there is no contrary intention expressed in the trust order against giving effect to the wishes of the beneficial owners. The principal issue is whether settlement of the proceedings is in the best interests of the beneficiaries as a whole.

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<sup>33</sup> [2015] NZHC 2535

<sup>34</sup> *Eaton v LDC Finance Limited* [2013] NZHC 1242

[71] These proceedings have been taxing on all of the parties as well as the owners. They have also come at a cost. During this period the owners have lost control of their trust and for good reason. That said, following a lengthy process of dialogue and hui as well as the obtaining of independent advice, the parties have now come to an agreement. That settlement involves indemnifying the current responsible trustee against any future potential proceedings. I agree that a pragmatic approach is required, one that draws a line under the events of the past. The owners have had the opportunity to consider the proposals. They agree with them and now seek to have the settlement approved and implemented.

[72] I accept the arguments of the parties that a comprehensive settlement of all outstanding issues is required to bring these matters to a final conclusion. They have been involved in a lengthy set of negotiations and consultation with the owners. Against that background, I am prepared therefore to confirm that Mr Gray is to be indemnified against any future claims arising out of the subject matter of these and the previous proceedings. To avoid doubt, Mr Gray's indemnity includes any future claim for any alleged failure to pursue the former trustees for any losses that have been the subject of these and the previous proceedings concerning the trust.

*Is Mr Te Hoata entitled to Special Aid?*

[73] Finally, the parties sought an order for a grant of special aid for the legal costs of Mr Te Hoata. Counsel submitted that Mr Te Hoata is in a unique position among the beneficial owners in that, as previously noted, he is not an owner or beneficiary of the Reservation Trust and therefore will receive no benefit from the purchase of the Mangakoura Hall. Counsel contended that, although they have sought an award of compensation in Mr Te Hoata's favour, this will not entirely restore him to the position he would have occupied had the hall not been purchased, given that he has incurred legal costs in relation to the proceedings. Counsel therefore asked that the application for special aid in relation to Mr Te Hoata's legal costs be considered favourably.

[74] Ms Bennett did not file particulars in relation to the amount of legal costs sought, but submitted that the costs are in the vicinity of \$5,000.00 to \$6,000.00, as Mr Te Hoata has agreed to forego most of his other expenses. She submitted that Mr Te Hoata has had to be represented separately to protect his unique interests and he is the only party who has personally met the costs of his involvement in these proceedings, which have spanned almost 10 years.

[75] Section 98 of the Act provides:

**98 Maori Land Court Special Aid Fund**

- (1) There shall be paid out of public money into a fund to be known as the Maori Land Court Special Aid Fund (in this section referred to as the Fund) such amounts as are from time to time appropriated by Parliament for the purpose.
- (2) The Fund shall be held by the Chief Registrar of the Maori Land Court.
- (3) The court may from time to time make orders for the payment from the Fund of the reasonable legal costs or the reasonable out-of-pocket expenses or both of—
  - (a) any person or class of person heard or represented in any proceedings before the court:
  - (b) any barrister or solicitor appointed to assist the court under section 70(3)(a).
  - (c) *Repealed*
- (3A) *Repealed*
- (4) A duplicate of any order made by the court under subsection (3) shall be forwarded by post to the Legal Services Commissioner as soon as practicable after the making of the order.
- (5) No person in whose favour an order has been made under subsection (3) may apply for or be granted assistance under the Legal Services Act 2000 in respect of the same matter.
- (6) Where an order is made under subsection (3), the court may also make an order charging any real or personal property of the person or class of person in whose favour the first order is made, or of any other owners whose interests are or could have been affected by any order made in the proceedings to which the grant of aid relates, with the whole or any part of the amount so ordered to be paid out of the Fund, and fixing the terms and conditions on which the amount charged is to be repaid.
- (7) Every charge created by an order of the court under subsection (6) shall be in favour of the Māori Trustee on behalf of the Crown.
- (8) Any such charge may be registered against any interest in land to which it relates in accordance with Part 5.
- (9) Except as the court may otherwise order, there shall also be paid out of the Fund—
  - (a) the reasonable fees and reasonable expenses of any accountant to whom a Judge refers a matter under section 40(3); and
  - (aa) the reasonable fees and reasonable expenses of any person the Registrar is directed, by the Judge, to engage to assist with an inquiry and report under section 40; and
  - (ab) the reasonable fees and reasonable expenses of a mediator to whom a Judge refers matters under section 30B(3)(c), section 30C(3)(d), section 30G(3)(a), or section 30I(2); and
  - (b) all reasonable costs and reasonable out-of-pocket expenses of any person called by the court as a witness under section 69(2); and
  - (c) the reasonable fees and reasonable expenses of any barrister or solicitor appointed under section 70(3); and
  - (d) the reasonable fees and reasonable expenses of any person appointed as a receiver under section 83; and

- (e) the reasonable fees and reasonable expenses of any person appointed as an examining officer under section 280 to investigate the affairs of a Maori incorporation.

[76] The leading authority in relation the granting of special aid is *De Loree v Mokokoko – Hiwirau C.*<sup>35</sup> In that decision, the Māori Appellate Court set down the general principles for payments from the Special Aid Fund. Those principles have been cited with approval by several Māori Land Court and Māori Appellate Court decisions and I adopt the reasoning set out in those decisions.<sup>36</sup>

[77] I accept that, in all of the circumstances, it is appropriate that Mr Te Hoata be represented and that the costs of his counsel be supported with a grant from the fund. After all, without his cooperation, the proceedings may have been even more prolonged. That he needed to receive independent advice given his unique position as a beneficiary of one but not the other of the two trusts involved in these proceedings is also a relevant consideration.

### Decision

[78] The following orders are now issued, per Te Ture Whenua Māori Act 1993:

- (a) Sections 18(1)(a) determining ownership of the building known as Mangakoura Hall situated on the Tauhara Middle 4A1N1B Māori Reservation in favour of those trustees;
- (b) Section 18(1)(a) that the responsible trustee pay \$11,558.12 to Hohepa Te Hoata as compensation in satisfaction of his entitlement to the Mangakoura Hall;
- (c) Sections 237 and 238 that the following amounts be reimbursed to the trust:
- (i) \$106.17 to be paid by Faye Walker as interest on her loans; and
- (ii) \$300 to be paid by Thomas Clarke as reimbursement for tuition fees

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<sup>35</sup> *De Loree v Mokokoko – Hiwirau C* (2001) 11 Waiariki Appellate MB 249 (11 AP 249)

<sup>36</sup> *Barcello–Gemmell – Gore Blks XVII and XIX S90B2* (2004) 6 Te Waipounamu Appellate MB 29 (6 APTW 29); *Pomare v Rangihaeata – Hongoeka 7 Lots 2 and 3* (2009) 16 Whanganui Appellate MB 108 (16 WGAP 108); *Ripia* [2012] Maori Appellate Court MB 175 (2012 APPEAL 175); *Wano v Ngati Hineuru Iwi Inc* (2013) 24 Takitimu MB 56 (24 TKT 56); *Te Runanga o Ngāti Hine v Te Runanga ā Iwi o Ngāpuhi* [2014] Māori Appellate Court MB 133 (2014 APPEAL 133)

- (d) Sections 237 of the Act and s 64 of the Trustee Act 1956 that authority is given for Mr Gray to accept the decision of the owners as settlement of the issues as specified in these proceedings and not pursue further losses as agreed by the beneficial owners; and
- (e) Section 98 for the payment of \$5,000 to Hohepa Te Hoata as contribution towards his reasonable legal costs in relation to these proceedings.

[79] All applications are concluded and dismissed. Following the postal vote regarding possible aggregation of the blocks, adoption of a new trust order and the election of trustees, fresh applications are to be filed with the Court when appropriate.

Pronounced at 4.30 pm in Whakatane on Friday this 29<sup>th</sup> day of April 2016

L R Harvey  
**JUDGE**